

Appeal No. T/2015/63

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER (Traffic Commissioner Appeals)**

**ON APPEAL from the DECISION of a DEPUTY TRAFFIC COMMISISONER FOR
THE WELSH TRAFFIC AREA**

Dated: 23 September 2015

Before:

Mr E Mitchell	Judge of the Upper Tribunal
Mr M Farmer	Member of the Upper Tribunal
Mr G Inch	Member of the Upper Tribunal

Appellants:

**Mr M & Mrs V Smith; the partnership carried on by Mr & Mrs
Smith**

Attendances:

Mr J Backhouse, solicitor, of Backhouse Jones Solicitors, for the Appellants

Heard at: Cardiff Civil Justice Centre
Date of hearing: 15th February 2016 (followed by supplementary written submissions)
Date of decision: 26 October 2016

DECISION OF THE UPPER TRIBUNAL

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Case No. T/2015/63

IT IS HEREBY ORDERED that these appeals are ALLOWED. The following decisions of the Deputy Traffic Commissioner taken on 23 September 2015 are set aside: his refusal to grant the partnership a standard international licence; his disqualification orders in respect of Mr & Mrs Smith given under section 28 of the Goods Vehicles (Licensing of Operators) Act 1995; his order disqualifying Mr Smith from acting as a transport manager, given under Schedule 3(16)(2) to the 1995 Act.

SUBJECT MATTER:-

standard road transport licence; interim licences; good repute of operator and transport manager; disqualification orders; environmental conditions

CASES REFERRED TO:-

London & Clydesdale Estates Ltd v Aberdeen DC [1980] 1 WLR 182;
Crompton (t/a David Crompton Haulage) v. Department of Transport [2003] EWCA Civ 64, [2003] RTR 34;
Márton Urbán vs Vám-és Pénzügyőrség Észak-alföldi Regionális Parancsnoksága (C-210/10).

REASONS FOR DECISION

Introduction

1. This case raises an issue of potentially wider importance, namely the process by which environmental conditions are attached to interim operators' licences under the Goods Vehicles (Licensing of Operators) Act 1995 ("the 1995 Act"). There is no right of appeal to the Upper Tribunal against traffic commissioners' interim licence decisions. In this case, apparent breaches of interim licence conditions were relied on by a traffic commissioner in refusing an application for a standard international operators' licence. By this route, the validity of interim licence conditions came before the Upper Tribunal.

Background

The public inquiry hearing on 30th April 2014

2. Mr Smith held a standard international operator's licence, granted to him under the 1995 Act as a sole trader. At a public inquiry on 30th April 2014, Mr Dorrington, a Deputy Traffic Commissioner for the Welsh Traffic Area (hereafter "the DTC") indicated that the relevant transport business might in fact be carried on by a partnership rather than by Mr Smith as a sole trader. This prompted Mr Smith and his wife Mrs Smith to consider applying for a standard international licence as a partnership.

The application for a standard licence

3. On 27th May 2014, Mr & Mrs Smith applied, as a partnership, for a standard international licence. The application specified two proposed operating centres, one referred to as Rob Morgan (in Slebech) and the other as Melinda Wood (in Crundale).

4. The Office of the Traffic Commissioners (OTC) asked the partnership to complete a supplementary environmental information form. Completed on 7th July 2014, the partnership stated on the form that authorised vehicles would use the operating centres on Saturdays and Bank Holidays. The form asked "between which hours will authorised vehicles normally arrive and leave on those days?" The partnership answered "from 7 a.m. to 10 p.m."

The interim standard licence

5. The partnership also requested an interim licence when they applied for a standard international licence. This was necessary in order for the transport business to carry on operating lawfully in the event that Mr Smith's sole trader's licence was revoked. The partnership were granted an interim operator's licence on 27th August 2014. The interim licence contained 'hours of use' conditions for the operating centres.

6. For the Morgan/Slebech centre these were

"There will be no operation, loading, unloading or movements of authorised vehicles into, out of, or within the operating centre outside of the hours of 0700-2200 Monday to Friday, except that up to three such movements out and three such movements in are permitted on each Saturday, Sunday and Public Holiday between 0800-1800."

7. For the Wood/Crundale centre, the conditions were the same except that the restricted activity was simply movement of vehicles (rather than "operation, loading, unloading or movements").

8. It can be seen that the hours of use conditions attached to the interim licence differed from the intended hours of weekend use specified in the partnership's supplementary environmental information form.

The public inquiry hearing on 26th November 2014

9. Local residents made statutory representations objecting to the partnership's application, under section 12 of the 1995 Act. Their objections concerned the Morgan/Slebech operating centre and not the Wood/Crundale centre.

10. At the inquiry, Mr Smith gave evidence, in response to questions from his solicitor that, on weekends, vehicles were "out from 7 a.m, onwards". This prompted the DTC to direct a Traffic Examiner to investigate whether the Rob Morgan/Slebech centre was being used in breach of the interim licence condition that regulated its weekend hours of use.

The decisions of 27th January 2015

11. On 27th January 2015, the DTC revoked Mr Smith's sole trader's operator's licence on the ground that the transport undertaking was in fact being conducted by a partnership. Despite this, the haulage business continued to operate under the interim licence. The DTC also decided that the Morgan/Slebech operating centre was "environmentally suitable" and so rejected the statutory representors' complaints.

The public inquiry hearing on 25th August 2015

12. On 15th July 2015, the OTC wrote to the partnership about the forthcoming public inquiry. Their letter explained that, at the inquiry, the DTC would address apparent non-compliance with the interim licence condition that restricted use of the Wood/Crundale centre on Saturdays and Bank Holidays. This matter came to light during the Vehicle Examiner's investigations, as directed by the DTC at the previous inquiry hearing.

13. While the DTC only directed the Traffic Examiner to investigate the Morgan/Slebech centre, his analysis of the partnership's tachograph records suggested significant non-compliance with the interim licence condition that restricted hours of weekend use of the Wood/Crundale centre. In the Examiner's opinion, the weekend hours of use condition was breached at the Wood / Crundale site on 61 occasions between 1st July 2014 and 31st January 2015.

14. The transcript of the inquiry shows that the DTC's main concern was apparent non-compliance with interim licence conditions at the Wood/Crundale centre

The Deputy Traffic Commissioner's decisions

15. The key issue, according to the DTC, was whether Mr Smith “could be trusted” to comply with the “specific environmental conditions” attached to his interim licence since those conditions would also be attached to any standard international licence. By this, the DTC meant operating centre ‘hours of use’ conditions.

16. The DTC agreed with the Traffic Examiner that, at the Wood/Crundale centre, the interim licence conditions were breached on 61 occasions between November 2014 and January 2015 mainly as a result of vehicles arriving at the centre after 6 p.m. The DTC took an especially dim view of the 15 breaches that he found occurred after the public inquiry hearing in November 2014.

17. The DTC found that Mr Smith had shown disregard for the licensing system and local residents. The “habitual and persistent” breaches, in particular those occurring after the previous inquiry hearing, meant Mr Smith could not be trusted to comply with environmental licence conditions. The DTC declined to give the partnership any “meaningful credit” for compliance with vehicle maintenance, drivers’ hours and tachograph rules because “operators are expected to be compliant at all times in any event” and the issue before him did not concern those aspects of the licensing regime. The DTC also found that Mr Smith had failed to be an effective transport manager for the period during which the breaches occurred.

18. The DTC proceeded to make the following decisions:

(a) he revoked the partnership’s interim standard international licence;

(b) under section 28 of the 1995 Act, he disqualified both Mr & Mrs Smith from holding or obtaining an operator’s licence in any traffic area (between 1 November 2015 and 1 November 2016)

(c) under Schedule 3, paragraph 16(2), to the 1995 Act, he decided that Mr Smith had lost his good repute as a transport manager and disqualified him from acting as a transport manager in every European member state. This disqualification took effect immediately and was to last for one year;

(d) he refused Mr & Mrs Smith’s application for a standard international licence.

19. The Smiths applied to the DTC for, and were granted, a stay of his decisions pending their appeal to the Upper Tribunal.

Legislative framework

Goods Vehicles (Licensing of Operators) Act 1995

20. Section 23(1) of the 1995 Act permits a traffic commissioner to attach environmental conditions to an operator’s licence:

“On issuing an operator's licence...a traffic commissioner may attach to the licence such conditions as he thinks fit for preventing or minimising any adverse effects on environmental conditions arising from the use of a place in the [relevant] traffic area as an operating centre of the licence-holder”.

21. Section 23(2) requires any such conditions to be of a type prescribed in regulations. Regulation 14 of the Goods Vehicles (Licensing of Operators) Regulations 1995 authorises conditions regulating “the times between which there may be carried out at every such operating centre any maintenance or movement of any authorised motor vehicle or trailer and the times at which any equipment may be used for any such maintenance or movement”. Contravention of such a condition is an offence for which a person is liable on summary conviction to a fine not exceeding level 4 on the standard scale (section 23(6)).

22. Section 23(4) gives an applicant the right to comment on proposed ‘hours of use’ conditions. It provides such a condition “shall not” be attached to a licence “unless the applicant for the licence...has first been given an opportunity to make representations to a traffic commissioner with respect to the effect on his business of the proposed condition”. If representations are made, section 23(5) requires the commissioner to give “special consideration” to them “in determining whether to attach the proposed condition”.

23. Amongst the grounds for revocation of a licence in section 26(1) are that “the licence holder has contravened any condition attached to the licence”.

24. Section 15(1) contains the general rule that a traffic commissioner, if s/he decides to grant a licence, must do so “in the terms applied for”. However, this is not an absolute rule. It is subject to various other sections of the Act, including section 23 which, as we have seen, authorises a commissioner to impose conditions as to the hours of use of an operating centre. In other words, a traffic commissioner may impose ‘hours of use’ conditions even if these would be inconsistent with the terms of the licence applied for.

25. Section 24 permits a traffic commissioner, on request, to issue an interim licence to a person who has applied for an operator’s licence. Section 24(3) permits a commissioner to attach operating centre ‘hours of use’ conditions to an interim licence. Section 24(7A) provides that a request for an interim standard licence shall not be treated as an application for an operator’s licence for the purposes of certain specified provisions of the Act. The specified provisions do not include section 23.

26. Section 25 provides for an interim licence to terminate in certain cases, including:

(a) where the application for a standard licence is granted, the interim licence terminates on the date on which it comes into force, where, for example, the application is granted in the terms applied for (section 24(4));

(b) where a refusal to grant a standard licence is appealed to the Upper Tribunal, and the Upper Tribunal orders the traffic commissioner to issue a full licence, the interim licence

terminates on the date on which the full licence comes into force or, if the application for a full licence is withdrawn, on that date (section 24(5));

(c) otherwise, the interim licence shall terminate on the date on which the proceedings are finally disposed of or such earlier date as the applicant may specify in a written request made to a traffic commissioner (section 24(6)).

Proceedings before the Upper Tribunal

27. Mr & Mrs Smith appealed to the Upper Tribunal against the Traffic Commissioner's decisions. They were represented by Mr James Backhouse, solicitor, of Backhouse Jones Solicitors.

28. Mr Backhouse argued the DTC: failed to give sufficient credit for the steps taken to prevent breach of the hours of use condition once Mr Smith appreciated the condition prohibited movements of vehicles at times that differed from the proposed weekend use specified in the supplementary environmental information form; failed to take into account the absence of complaints about the Wood/Crundale operating centre; erred by failing to give credit for the undertaking's compliance with other aspects of the licensing regime; gave decisions that were a disproportionate response to the licensing concerns that arose.

29. At the hearing before ourselves, we were informed that, despite the DTC having granted a stay of his decisions, Mr Smith had decided to leave the haulage industry. It also became apparent to ourselves that there might be an issue as to whether the hours of use conditions attached to the interim licence were valid. For these reasons, we directed a supplementary written submission.

30. Mr Backhouse's submission for Mr & Mrs Smith sought to rely on an additional ground of appeal, namely that the DTC's decisions were flawed because they were based on non-compliance with interim licence conditions that were themselves invalid (having been attached without any representations having been invited under section 23) and/or the DTC should have taken into account the fact that the interim licence conditions were attached in contravention of section 23 when evaluating the seriousness of the breaches. The submission made the point that, had the Smiths been given the opportunity to make representations, they would have argued that the 8 a.m. to 6 p.m. restriction on weekend use would have had an adverse effect on their business.

31. The submission asserted section 23 representations were not sought before the interim licence was issued. We accept that because the OTC file of papers contain no evidence they were and, had they been, we are sure this would have been mentioned at the public inquiries. None of the transcripts record any discussion of section 23 representations having been invited prior to issue of the interim licence.

32. The submission also stated that Mr Smith had sold the haulage business and returned the operators' discs to the OTC. His principal aim, therefore, was to "clear his name" through revocation of the disqualification orders.

33. We permit Mr & Mrs Smith to rely on this additional ground of appeal. We agree with Mr Backhouse that it is an important point and it appears to be free of authority. And it is not entirely unrelated to one of the arguments run by the Smiths before the DTC, namely that the seriousness of the breaches of condition should be evaluated taking into account their assumption that the interim licence conditions were in the same terms as the description of proposed weekend use given in their supplementary environmental information form.

Conclusions

34. The 1995 Act draws a careful distinction between applications for full licences and requests for interim licence. Section 24(7A)(a) provides that a request for an interim standard licence shall not, in certain respects, be treated as an application for a full standard licence. For example:

- (a) the requirement to publish notice of an application does not apply (sections 10 and 11);
- (b) the provisions for statutory objections and representations do not apply (sections 12 and 14);
- (c) the commissioners' powers to review their decisions do not apply (section 36);
- (d) the right of appeal to the Upper Tribunal does not apply (section 37);
- (e) the provisions for transfer of operating centres do not apply (Schedule 4).

35. Section 24(7A)(b) of the 1995 Act provides that a request for an interim standard licence "shall be treated as an application for [an operator's licence] for the purposes of any other provision of this Act". That must include section 23. That follows from the clear words of section 24(7A) and, moreover, section 23 has to apply because, if it did not, there would be no power to impose section 23 conditions on interim licences which cannot have been Parliament's intention.

36. The DTC was therefore required by section 23(4) of the 1995 Act to give the partnership the opportunity to make representations as to the effect on their business of the proposed 'hours of use' interim condition which, we note, differed from the intended hours of use set out in the supplementary environmental information form. Had any such representations been made, the DTC would have been required to give them "special consideration" (section 23(5)).

37. The DTC did not comply with section 23 in attaching 'hours of use' conditions to the partnership's interim licence. What was the legal effect of this?

38. The 1995 Act does not specify whether a failure to comply with section 23's requirement to seek representations invalidates a condition attached to a licence. This means our task is to discern Parliament's intention.

39. *Halsbury's Laws* (volume 61, Judicial Review, para. 626) gives the following summary of the law which we accept as accurate and adopt:

“Historically the legal consequence of non-compliance with procedural or formal requirements has been regarded as wholly or partly dependent upon the answer to the question whether the requirement is to be classified as mandatory or directory, but a variety of different meanings have been attached to this distinction. Where a statute provides a mandatory procedure it must be followed...Older authorities tended to assume that an act done or decision reached in breach of a mandatory requirement was a nullity and void *ab initio*, so that it was as if it had never existed, whereas an act done in breach of a merely directory provision was merely voidable and therefore effective until set aside. However, it is now clear that even where an act is void for failure to comply with a mandatory provision, that act may nonetheless have an existence until set aside and cannot usually be safely disregarded.”

40. It is clear that section 23 imposes a mandatory requirement on a traffic commissioner to afford an applicant the opportunity to make representations. That is shown by the use of “shall” in section 23(4) (a condition “shall not” be attached to a licence “unless the applicant for the licence...has first been given an opportunity to make representations) which is reinforced by the obligation to give “special consideration” to any representations made. The next question is whether the DTC’s failure to comply with section 23(4) rendered the relevant conditions of the interim licence a complete nullity so that the DTC was required to ignore breaches of them.

41. In *London & Clydesdale Estates Ltd v Aberdeen DC* [1980] 1 WLR 182, Lord Hailsham, speaking in the House of Lords, said:

“When Parliament lays down a statutory requirement for the exercise of legal authority it expects its authority to be obeyed down to the minutest detail. But what the courts have to decide in a particular case is the legal consequence of non-compliance on the rights of the subject viewed in the light of a concrete state of facts and a continuing chain of events. It may be that what the courts are faced with is not so much a stark choice of alternatives but a spectrum of possibilities in which one compartment or description fades gradually into another. At one end of this spectrum there may be cases in which a fundamental obligation may have been so outrageously and flagrantly ignored or defied that the subject may safely ignore what has been done and treat it as having no legal consequences upon himself. In such a case if the defaulting authority seeks to rely on its action it may be that the subject is entitled to use the defect in procedure simply as a shield or defence without having taken any positive action of his own.”

42. Lord Hailsham went on to decide that, in the case before their Lordships, there was “total non-compliance” with a statutory requirement to specify rights of appeal. Despite that, the resultant act was not a “complete nullity...and it exists until it was set aside” (as Lord Keith put it in the same case).

43. The partnership’s interim ‘hours of use’ condition was attached to their interim licence in breach of section 23(4). We have no doubt that, had the condition been challenged in judicial

review proceedings, the High Court would have held the condition to be invalid and made an order quashing it. That, however, did not happen and, in our view, the interim condition was not *void ab initio* so that the DTC was required to ignore the partnership's breaches. It was of a similar nature to the requirement in *London & Clydesdale Estates Ltd* and we do not think Parliament could have intended for operators to be free to ignore wrongly attached, but unchallenged, interim conditions.

44. However, the fact that this condition was imposed in contravention of the requirement to seek representations in section 23(4) was a relevant consideration. This should have been taken into account by the DTC in assessing the seriousness of the breaches especially in circumstances where the partnership argued that, had they not assumed the interim conditions matched the hours of use information in their supplementary environmental information form, they would not have breached them (or not have breached them so flagrantly). We are of the view that the DTC should have taken the point himself because it arose from a traffic commissioner's own failure to comply with statutory requirements. The DTC's failure to take this consideration into account was an error of law for which reason we allow this appeal.

45. Our decision is not to be read as diluting the importance of complying with interim licence conditions even if attached in contravention of section 23(4). And we stress the need for operators carefully to check interim licence conditions. Operators are expected to comply with such interim conditions and, if they object to them, should apply to a traffic commissioner for their variation. However, the fact that an interim condition has been attached in contravention of section 23(4) is a relevant consideration when an operator faces enforcement action for failure to comply with the condition. That is especially so where, as here, compliance with section 23(4) could realistically have affected the framing of an interim condition.

46. We also decide that the DTC erred in law in another respect. He rejected the argument that many years of compliance with maintenance, drivers' hours and tachograph rules could be relied on as going to the partnership's credit. We note that the DTC's

revocation of the partnership's interim licence is not before the Upper Tribunal (see paragraph 34 above). However, in reality, the DTC's refusal to grant the partnership a standard licence amounted to him closing down an existing haulage business (since Mr Smith's sole traders licence had been revoked in the light of the DTC's view that the business was being run by a partnership not a sole trader).

47. The Court of Appeal in *Crompton (t/a David Crompton Haulage) v. Department of Transport* [2003] EWCA Civ 64, [2003] RTR 34 held:

"if loss of repute is found the inevitable sanction is revocation...There must therefore be a relationship of proportionality between the finding and the sanction, and that relationship has a direct bearing on the approach to be adopted in any set of circumstances to the question of whether or not the individual has lost his repute."

48. That decision concerned provisions of the 1995 Act that require a traffic commissioner to revoke an operator's licence if the commissioner finds an operator has lost its good repute. But

the underlying point is of more general application and requires all regulatory action that, in practice, closes down a business to be proportionate regulatory response. This is in fact necessary to secure compliance with the European legislation which the 1995 Act seeks to implement (Regulation (EC) No. 1071/2009). In the road transport case of *Márton Urbán vs Vám-és Pénzügyőrség Észak-alföldi Regionális Parancsnoksága* (C-210/10) the Court of Justice of the European Union held:

“24...the measures imposing penalties permitted under national legislation must not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (see, to that effect, Joined Cases C-379/08 and C-380/08 *ERG and Others* [2010] ECR I-2007, paragraph 86).”

49. In our view, it is self-evident that many years of compliance with certain aspects of the regulatory regime, if proven, must be taken into account in deciding what would be a proportionate regulatory response to non-compliance with other aspects. The DTC made an error of law by deciding otherwise.

Disposal of the appeal

50. The appeal is allowed. Since Mr Smith has now left the road haulage industry there is no point, in our view, in remitting this case to a traffic commissioner for reconsideration.

51. We make the following findings:

- (a) the partnership were seriously remiss in failing to ensure that their business was operated in compliance with the hours of use conditions attached to their interim licence;
- (b) the seriousness of that failure is diluted, but not excused, by the DTC’s failure to comply with the section 23(4) obligation to seek representations before attaching the interim hours of use condition;
- (c) the weekend use of the Wood/Crundale operating centre did not attract objections from local residents;
- (d) it was not disputed before the traffic commissioner that this haulage business generally had a good track record of complying with licensing requirements, and we so find, although we do not have the evidence on which to make any more precise finding than this;
- (e) Mr Smith was candid about the partnership’s failure to comply with its interim licence conditions. He did not try to hide anything.

52. Since the partnership has ceased trading, and sold its business, the application for a standard international licence has effectively been withdrawn. Had that not been the case, we would have set aside the DTC’s refusal to grant a standard international licence and remitted

the matter to a traffic commissioner for reconsideration. Instead, we simply set aside the DTC's refusal of the application and make no further order.

53. We set aside the DTC's disqualification orders. We are satisfied that the partnership's non-compliance with the interim licence conditions was not of a severity to justify disqualification orders under section 28. In so deciding, we find that, had the section 23(4) procedure been followed, then, taking into account that the Wood/Crundale site did not attract complaints from local residents, the resulting interim conditions would either not have been breached or the breaches would not have been nearly as numerous. We also take into account the haulage business' generally good track record in terms of regulatory compliance. For this reason, we do not agree with the DTC's finding that Mr Smith could not be trusted to comply with environmental conditions. We do not think he is a person whose business model incorporated wilful non-compliance with the licensing regime.

54. For the same reasons as just given, we set aside the DTC's decision to disqualify Mr Smith as a transport manager because he had lost his good repute.

55. Our decisions have immediate effect. Upon withdrawal of the partnership's application for a standard international licence, it seems to us that the partnership's interim licence (as given continuing effect by the DTC's stay of his decisions) terminated automatically. Since the Upper Tribunal's jurisdiction does not extend to hearing challenges to interim licence decisions, we limit ourselves to making that observation.

(Signed on the Original)

E Mitchell
Judge of the Upper Tribunal
26 October 2016